IN THE HIGH COURT OF JUDICATURE AT MADRAS

Date: 04.04.2007

CORAM:

THE HON'BLE MR. JUSTICE P.JYOTHIMANI

Second Appeal No.387 of 1995

and

C.M.P.No.3965 of 2006

1. Chinna Poojari @ Kandappa Gounder
2. Rasi Gounder

... Appellants/Defendants.

Vs.

1. K.Ramasami
2. K.Natesan

... Respondents/Plaintiffs.

PRAYER: Second Appeal against the Judgment and decree dated 16.12.1994 and made in A.S.No.37 of 1994, on the file of Sub Court Sankari reversing the Judgement and decree dated 27.09.1993 and made in O.S.No.578 of 1988, on the file of District Munsif Court, Sankari.

For Petitioners : Mr.K.Duraisamy, S.C. for M/s. Muthumani Duraisamy D.Selvaraj

For Respondent.1 : Mr.T.R.Mani, S.C.for M/s.T.M.Hariharan Aruna Ganesh

Respondent.2 : No appearance.

J U D G M E N T

The defendants in the Trial Court are the appellants in the Second Appeal. The plaintiffs filed the suit for declaration and injunction in respect of their right to use the suit cart-track for their men,cart and cattle to ingress and egress from their land in Survey No.194/1 and also for a permanent injunction from obliterating or disturbing or interfering with user and enjoyment of the suit cart-track. The suit cart-track is mentioned as A,B,C,D,E,F,G,H,I commencing from Sangari to Trichengode road East to West running on the Northern edge of Survey No.188/2 belonging to the defendants on the point ABC and thereafter running to the point CDE towards West and passing through the other lands of the defendants on the point EFG from North to South towards the Western side and thereafter passing through Survey No.188/1 in the point GH and to reach Survey

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No.194/1 wherein the plaintiff's house stated to have been situated at the point of I.

2. Admittedly, the defendants are the joint owners of the land in Survey No.188/2 Sangari Village and Survey No.194/2B and 194/2A. As it is seen in the plaint the claim in respect of these cart-track are made on three grounds, namely,

1) As mamool pathway for all the land owners in Survey No.188 and 194 of Sangari Village

2) The plaintiffs are using the suit pathway to reach their house in Survey No.194/1 as it is the only path way since no other pathway is available and from time immemorial suit cart-track was used for ingress and egress as easement of necessity and

3) On the basis of prescriptive title under Ex.A.7 dated 23.12.1986 as used by the predecessors in title as a demarcated or plan marked pathway as per the evidence of P.W.1.

3. On the other hand, it was the case of the defendants in the suit that the property comprised in Survey No.188/2 which is otherwise called Poocha Goundan Kadu belong to them and the cart-track is their private cart-track and it does not lead to the plaintiff's land. The Trial Court has dismissed the suit on various grounds, namely, the documents of title relied upon by the plaintiffs which are of the year 1939 to 1972 marked as Exs.A1 to A5 do not refer to the cart-track apart from the finding that the plaintiffs have not proved the right by prescription by way of grants. That apart the Trial Court has also found against the plaintiff that on the death of the first plaintiff even though the second and third plaintiffs who are the sons, are on record the daughter was not impleaded as a party and therefore, on the basis of non joinder of necessary parties also the suit was dismissed. On appeal filed by the plaintiffs, the First Appellate Court has decreed the suit by reversing the judgement of the Trial Court relying upon the admission in the written statement of the defendants that such cart-track was in existence across the Survey Nos.182/2 and 183/3 to reach the plaintiffs' property from Sangari Trichengodu main road. It is as against the judgement of the First Appellate Court the defendants have filed the present Second Appeal.

4. While admitting the Second Appeal this Court has framed the following substantial question of law:

> "Whether the First Court was right in allowing the appeal on the ground of easement of necessity when there is an alternative pathway for the plaintiff?"

5. A reference to the judgement of First Appellate Court shows that the appeal was allowed not on the basis of easement of necessity but on other grounds mainly relying upon the FMB sketch marked as Exs.A16 and A17 apart from the analysis of the various documents marked as Exs.A22 to A.25 and Ex.B.1 that a cart-track has been used by people as mamool cart-track.

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6. In view of the same, as rightly contended by the learned Senior Counsel for the respondents in this appeal, the plea of easement of necessity has been given up by the plaintiffs and therefore, the substantial question as framed,does not survive resulting in the obligation of framing additional substantial questions of law under Section 100(5) Proviso of the Code of Civil Procedure as follows:

> "Whether the First Appellate Court was right in allowing the appeal on the basis that the suit cart-track has been used as a mamool pathway apart from relying upon the documents to come to the conclusion that they are demarcated pathway as it is seen in Exs.A.16 and A.17?"

7. Mr.K.Duraisamy, learned Senior counsel appearing for the appellants would submit that Ex.A.7 sale deed dated 23.12.1986 by which the plaintiffs have purchased the property from the previous owner Kaliyappan does not mention about the cart-track. That apart it is his contention that while the said Ex.A.7 was dated 23.12.1986 the suit was filed on 08.01.1987 on the basis that on 05.01.1987 the defendants have attempted to disturb the possession which was the cause of action and in spite of that the said sale deed dated 23.12.1986 was not filed along with the plaint.

8. On the other hand, a reference to Ex.A.7 shows that even though it was stated to have been executed on 23.12.1986 it was registered only on 07.01.1987 and therefore, there was no occasion for the plaintiff to file the document along with the plaint. The learned Senior counsel would further contend that when Ex.A.7 document uses the word mamool pathway which was included in the schedule and if it forms part of the sale deed for which also the valuation has been made, it cannot be believed to be a mamool pathway. On the other hand, as it is seen in the said Ex.A.7 the valuation of the pathway at the rate of Rs.250/- was made only in accordance with the provisions of the Stamp Act for the purpose of payment of stamp duty. Therefore, it has to be seen as to whether the suit pathway has been used as a mamool pathway for which the plaintiffs have a right by prescriptive title.

9. The learned Senior counsel would further contend by relying upon the judgement of the Hon'ble Supreme Court reported in 2003(4) SCC 161 that in the absence of pleadings, no evidence can be looked into in relation to those matters by relying upon Order 6 Rule 2 of Code of Civil Procedure. I am afraid that on the facts of this case the above said judgement may not have any application, for, the plaint categorically says "the suit cart-track is a mamool pathway for all the land owners in Survey No.188 and 194 Sangari Village". Therefore, it is to substantiate the said pleading if evidence is let in by the plaintiff the same cannot be denied by relying upon Order 6 Rule 2 of Code of Civil Procedure. In such circumstances, since the plaintiffs' case, which was also based on easement of necessity has been given up and the First Appellate Court has decided on different issue, the additional documents filed on behalf of

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the appellants/defendants in the Second Appeal stage for the purpose of proving alternate pathway to the plaintiffs does not arise and therefore, C.M.P.No.3965 of 2006 in S.A.No.387 of 1995 has no relevancy and in view of the same the said C.M.P. is dismissed.

10. It is seen as per the judgement of the First Appellate Court that on analyzing the various documents marked on the side of the plaintiffs as Exs.A.22 to A.25 under which the defendants have purchased the various portions of the properties by mentioning paimash number for which a correlation statement has been filed under Ex.A.6 to show that they are connected with the suit properties and the said documents contain the existence of a cart-track. The Appellate Court has also found that even under Ex.B.1 sale deed dated 25.02.1974 by which the second defendant has purchased the property also contains the clause about the mamool cart-track and therefore has come to the conclusion that the suit cart-track has been used as a common cart-track. This aspect was not properly appreciated by the learned Trial Judge.

11. In addition to that as rightly contended by the learned Senior Counsel appearing for the respondent Mr.T.R.Mani, the First Appellate Court after analyzing Exs.A.22 to A.25 and Ex.B.1 has held that existence of the mamool pathway has been confirmed by Exs.A.16 and A.17 which are the field measurement maps. In such circumstances there is no difficulty to come to the conclusion that it was based on the factual position and appreciation of various documents the Appellate Court has come to the conclusion that the suit pathway is a mamool pathway and therefore, there is no substantial question of law involved in this case at all.

12. However, Mr.K.Duraisamy, learned Senior Counsel appearing for the appellant has raised a point that when the earlier document in respect of the property ranging from 1935 to 1975 marked Exs.A1 to A5 have not chosen to mention anything about the mamool pathway or cart-track, mere mentioning of the same under later documents Exs.A.22 to A.25 or B.1 cannot be taken as if the presence of mamool pathway has been proved. I do not agree with the said contention. Even Ex.A.22 to A.25 are relating to 1957, 1958 and 1974 and as it is rightly pointed out by the learned Senior Counsel Mr.T.R.Mani appearing for the respondents, Ex.A.1 to A.5 are relating to the dominant tenement while Exs.A.22 to A.25 and B1 relating to servient tenements which require the stipulation about the existing passage. It is a settled law that if it is a dominant heritage such right even without mentioning explicitly will be deemed to be inherent in the construction of the document. In such cases as it is pointed out under Section 8 of the Transfer of Property Act, 1882 while effecting operation of transfers the incidents which are transferred include the easement annexed thereto and mentioning of that may not be necessary. But on the other hand if it is servient heritage it is the duty of the seller to disclose as it is seen under Section 55(1)(a) of the Transfer of Property Act which states as follows:

"55(1)(a) to disclose to the buyer any material defect in the

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property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;"

13. Accordingly, if the documents marked under Exs.A.1 to A.4 were of dominant heritage they do not require the disclosure of the passage and since Exs.A22 to A.25 and B.1 relate to servient heritage there is a disclosure by the vendor in his interest about the existence of the pathway and that does not mean that there was no common cart-track at all which is called as a mamool pathway. In addition to that as correctly pointed out by the learned First Appellate Court the field survey map marked as Exs.A.16 and A.17 show the presence of a pathway in the public record and therefore, there is no difficulty to come to the conclusion that this has been used by public as a mamool pathway.

14. In view of the finding given by the First Appellate Court based on the latest field measurement map marked as Esx.A.16 and A.17 in addition to the contents of the document Exs.A.22 to A.25 and B.1 and also admission of D.W.1 about the existence of cart-track, there is no difficulty to come to the conclusion that ,what is claimed by the plaintiffs is not only a mamool pathway in the suit cart-track, in the sense that it has been used in usual manner but the same has been marked under the field measurement and therefore, the result public has a right to use the same. In view of the same the reliance placed by the learned counsel for the appellants, on the judgement of this Court reported in 1968(1) MLJ 502 to contend that the plaintiff should not be allowed to give evidence in the absence of the pleading has no application for the simple reason that in respect of the dominant heritage even omission of pathway is not material, since it is incident to the right transferred and in such circumstances it cannot be said that the party is not entitled to let in evidence.

15. The further contention raised on behalf of the learned Senior Counsel for the appellant that while the field map Exs.B.1, B.2 and B.3 does not show the suit pathway while Exs.A.16 and A.17 field measurement sketch shows the pathway cannot be said to be contradictory for the simple reason that Exs.B.1, B.2 and B.3 are relating to the old survey plans prior to resurvey while admittedly Exs.A.16 and A.17 are the latest field measurement maps and therefore, the later survey alone will prevail. In these circumstances and in the light of the analysis of evidence and documents by the learned First Appellate Judge which are factual in nature, I am of the considered view that there is absolutely no substantial question of law involves in this case and in view of the same

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the Second Appeal fails and the same is dismissed. No Cost. Consequently, connected C.M.P.is closed.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

nbj

To
1. The Subordinate Judge,
Sankari, Salem District.

2. The District Munsif,
Sankari, Salem District.

3. The Section Officer, VR Section,
High Court, Madras.

+ 1 CC To M/s.Muthumani Doraisamy, Advocate SR NO.22056
+ 1 CC To M/s.T.M.Hariharan, Advocate SR NO.21461

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